

**IN THE NEBRASKA COURT OF APPEALS**

<b>TRACY GANDARA-MOORE,</b>	)	<b>Case No. A-19-1110</b>
	)	
Appellant,	)	
	)	
v.	)	
	)	
<b>MICHAEL MOORE, JR.,</b>	)	
	)	
Appellee.	)	

**APPELLANT'S BRIEF**

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RE: APPELLANT'S APPEAL FROM THE DISTRICT COURT  
OF LANCASTER COUNTY, NEBRASKA

Honorable Susan Strong, District Judge, Presiding.

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March 11, 2020

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## **STATEMENT OF THE BASIS OF JURISDICTION**

Jurisdiction is conferred on the Appellate Court by Neb. Rev. Stat. § 25-1911 and §25-1912 (Reissue 2016). The appealable order is the Decree of Dissolution of Marriage entered by the Lancaster County District Court on October 25, 2019. (T46-63).

## **STATEMENT OF THE CASE**

### **1. Nature of the case.**

This is an appeal from a dissolution of marriage action held in the District Court of Lancaster County, Nebraska, before the Honorable Susan Strong, District Court Judge. (T1). Tracy Gandara-Moore, Plaintiff/Appellant (hereinafter “Tracy”), filed a Complaint for Dissolution of Marriage on August 4, 2017 requesting that her marriage to Michael Moore, Jr. (hereinafter “Michael”) be dissolved, that marital property and debts be divided, and that she receive custody of their two children, Santana (born 2012) and Arianna (born 2014). (T1-5) Trial was held on May 21, June 28, and September 3, 2019. (T46). A Decree of Dissolution of Marriage was entered on October 25, 2019. (T46-63) Tracy was awarded physical and legal custody of the minor children with Michael being awarded one weekend per month of visitation, alternating Spring Break/Christmas Break visits, and four weeks of summer visitation. (T47-49; 57-58). Tracy filed a Notice of Appeal and docketed the appropriate fee and bond on November 22, 2019. (T-)

### **2. Issues tried in the Court below.**

Issues tried before the District Court included a determination of legal custody, non-custodial parenting time, the objection to a witness not previously disclosed;

contempt matters against each party, calculation of child support, division of martial assets and debts, validity of a protection order against Michael, and attorney fees.

**3. How the issues were decided and what judgment was entered by trial court.**

The District Court denied Michael's request for legal custody based on the history of domestic violence and distance between the parties. (T48-49)

Despite the young age of the children, ages 4 and 5 at trial, (T47), history of domestic violence and abuse upon Tracy by Michael (17:16-22:7; E6,4,7,8:27; E7,4,8:30; 30:12-18; E28,1,6,8,30:33 66:4-22; 71:12-72:11) trauma to the children caused by the abuse (81:9-18; 86:3-9), and recommendation from the children's therapist, Michael Keady, (83:13-84:18; E33,1:84; 86:10-87:17; E34,1:89; 89:24-90:8; 93:19-95:4; 98:25-99) the Court denied Tracy's request for therapeutic parenting time to Michael and awarded extensive visitation. (T49, 57-58)

Over the objection of Tracy's counsel, the Court allowed the testimony of a previously undisclosed witness, Dr. McNeese, and an exhibit which the Court later relied upon for its decision on parenting time (103:13-118:5; E26,7-9:113; T48).

Both parties had filed contempt matters against each other. Tracy alleged, and Michael agreed, that the purge plan to get current with medical and daycare expenses was violated. (37:23-42:25; E29,1-17:41,42; 276:21-22; 279:2-4) The Court amended the purge plan to allow Michael additional time to get caught up on the balance owed. (T50) Michael alleged that, despite his failure to contact the children's therapist to conduct FaceTime parenting time and a no-contact order against any contact with Tracy, Tracy prohibited said FaceTime parenting time. (35:8-37:15; 91:11-92:21) Although unable to contact Michael due to the no contact order, the Court found Tracy purposefully

prevented Michael from conducting FaceTime parenting time. (T49) The Court awarded attorney fees to Michael in the amount of \$2,500.00 to purge the contempt. (T49)

In calculating child support, the Court determined that although Tracy was unemployed at the time of trial and would not be able to work due to a vehicular accident she had been involved in, her income capacity for the calculation should be attributed to a job she briefly held that she was unable to perform in. (T50; 13:11-14:5; 128:19-22; 129:21-130:11) Michael requested a downward deviation of \$400 per month in his child support obligation to account for travel expenses he believes he would incur as a result of initiating parenting time which the Court denied due to Michael voluntarily leaving Nebraska for the east coast. (T50) Ultimately, the child support calculation authored by the Court required Michael to pay \$691.00 per month. (T50, 61)

With regard to the division of marital assets and debts, despite evidence that an inheritance Michael received was used for the benefit of the marriage, the Court determined that Tracy dissipated the funds and included that in dividing the remaining debts. (T52-53) The Court awarded Tracy a judgment to equalize the marital estate in the amount of \$7,590.39, less \$2,500.00 for the attorney's fees awarded to Michael for the purge. (T52-53)

The District Court found that the Ex Parte Domestic Abuse Protection Order issued by Tracy against Michael should remain in place, but modified to allow Michael to pick up and return the children to Tracy's home and daycare/school. (T53)

With the exception of the attorney fees awarded to Michael for the contempt purge, the Court did not award any other attorney fees to either party. (T54)

#### **4. Scope of the Court of Appeals' review.**

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356 (2019). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id.* However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109 (2017). In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Id.* An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in

which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Krejci v. Krejci*, 304 Neb. 302 (2019).



## **ASSIGNMENT OF ERRORS**

1. The District Court erred by fashioning a visitation schedule to Michael that was not reasonable nor in the children's best interests. Further, the parenting plan contains vague and ambiguous provisions regarding pickup/dropoff times and does not provide safety provisions for a victim of violent domestic partner abuse.
2. The District Court erred by allowing a non-disclosed exhibit and witness testimony.
3. The District Court erred by finding Tracy in contempt of a temporary order and ordering a purge plan that included \$2,500.00 in attorney fees.
4. The District Court erred by developing a child support calculation contrary to the evidence and findings of the District Court.
5. The District Court erred by inequitably dividing the marital estate.
6. The District Court erred by not awarding Tracy reasonable attorney fees.

## PROPOSITIONS OF LAW

1. In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Burgardt v. Burgardt*, 304 Neb. 356 (2019)

2. A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109 (2017).

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4. The trial court has discretion to set a reasonable parenting time schedule. The determination of the reasonableness of a parenting plan is to be made on a case-by-case basis. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Wolter v. Fortuna*, 27 Neb.App 166 (2019).

5. In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following: (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; (c) The general health, welfare, and social behavior of the minor child; (d) Credible evidence of abuse inflicted on any family or household member...; and (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse. Neb. Rev. Stat. § 43-2923(6) (Reissue 2016).

6. Other factors which a court may consider are the moral fitness of the parents, respective environments offered by each parent, the emotional relationship between the child and parents, the effect on the child as the result of continuing or disrupting of

existing relationships, the attitude and stability of each parent's character, the parent's capacity to provide physical care and satisfy educational needs of the child and the general health, welfare, and social behavior of the child. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 459 (1996).

7. (1) When the court is required to develop a parenting plan:

(a) If a preponderance of the evidence demonstrates, the court shall determine whether a parent who would otherwise be allocated custody, parenting time, visitation, or other access to the child under a parenting plan:

(iii) Has committed domestic intimate partner abuse; (and)

(b) If a parent is found to have engaged in any activity specified by subdivision (1)(a) of this section, limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm. The limitations may include, but are not limited to:

(ii) Supervision of the parenting time, visitation, or other access between a parent and the child;

(iii) Exchange of the child between parents through an intermediary or in a protected setting;

(iv) Restraints on the parent from communication with or proximity to the other parent or the child;

(vi) Denial of overnight physical custodial parenting time; (or)

(ix) Any other constraints or conditions deemed necessary to provide for the safety of the child, a child's parent, or any person whose safety immediately affects the child's welfare.

(3) ... The parent found to have engaged in the behavior specified in subsection (1) of this section has the burden of proving that legal or physical custody, parenting time, visitation, or other access to that parent will not endanger the child or the other parent. Neb. Rev. Stat. §43-2932 (Reissue 2016).

8. It is within the trial court's discretion to admit or exclude the testimony of an expert witness, and a trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion. *Zarp v. Duff*, 238 Neb. 324 (1991).

9. Each party shall bring a completed Pretrial Memorandum (See Appendix Form 1) to the hearing. The parties are under a continuing duty to update all information that is required to appear on the Pretrial Memorandum; however, no amendment may be made to a Pretrial Memorandum 5 or less days prior to trial without consent of the other party or leave of the court. Local Rule 3-9 of the Third Judicial District of Nebraska.

10. Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence. *Krejci v. Krejci*, 304 Neb. 302 (2019).

11. As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines. *Gress v. Gress*, 274 Neb. 686 (2007).

12. If applicable, earning capacity may be considered in lieu of a parent's actual, present income. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources. When imputing income to a parent, the court shall take into consideration the specific circumstances of the parents, to the extent known. Those factors may include the parent's residence, employment and earnings history, job skills, educational attainment, literacy, age, health, and employment barriers, including criminal record, record of seeking work, prevailing local earning levels, and availability of employment. Neb. Ct. R. §4-204(E) (rev. 2020).

13. Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Hall v. Hall*, 26 Neb.App. 877 (2019).

14. When earning capacity is used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. *State v. Porter*, 259 Neb. 366 (2000).

15. The increased cost to the parent for health insurance for the child(ren) of the parent shall be prorated between the parents. When worksheet 1 is used, it shall be added to the monthly support from line 7, then prorated between the parents to arrive at each party's share of monthly support on line 10 of worksheet 1. The parent requesting an adjustment for health insurance premiums must submit proof of the cost for health insurance coverage of the child(ren). The parent paying the premium receives a credit against his or her share of the monthly support. If not otherwise specified in the support

order, "health insurance" includes coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment. Neb. Ct. R. §4-215(A) (rev. 2020).

16. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Osantowski v. Osantowski*, 298 Neb. 339 (2017).

17. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Burgardt v. Burgardt*, 304 Neb. 356 (2019); Neb. Rev. Stat. § 42-365 (Reissue 2016).

18. Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Burgardt v. Burgardt*, 304 Neb. 356 (2019)

19. As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule. Exceptions include property that a spouse acquired prior to the marriage or by gift or inheritance. Setting aside nonmarital property is simple if the spouse possesses the original asset but can be problematic if the original asset no longer exists. Separate property becomes marital property by commingling if it is inextricably mixed with

marital property or with the separate property of the other spouse. *Burgardt v. Burgardt*, 304 Neb. 356 (2019).

20. "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. As a remedy, marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Anderson v. Anderson*, 27 Neb.App. 547 (2019).

21. Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. Attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct. Additionally, in dissolution cases, as a matter of custom, attorney fees and costs are awarded to prevailing parties. Finally, a uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. In an action involving a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Moore v. Moore*, 302 Neb. 588 (2019).



## STATEMENT OF FACTS

Tracy and Michael were married on March 17, 2012 in Lincoln, Nebraska (T1). Two children were born of the marriage, namely, Santana (born 2012), age 5, and Arianna (born 2014), age 4 (T2). Tracy also has an older son, Diego, from a previous relationship. (12:8-17) The parties separated on July 17, 2017 following a domestic assault by Michael on Tracy and Michael immediately leaving for the East Coast. (12:6-7; 20:22-23:6; 23:7-17)

Throughout the marriage the parties were engaged in various forms of employment. Tracy holds a bachelor's degree in social work, but has been unable to complete licensing requirements. (14:25-15:6) Between 2016 and 2018, Tracy was employed by United Healthcare as a network manager. (13:16-21) She earned \$58,000 per year salary from this employment. (13:11-14) Her employment with United Healthcare required 12-14 hour workdays, weekends, and significant data analysis requiring critical attention to detail. (13:24-14:2; 130:2-3) Tracy admitted she was overwhelmed with the work, unable to keep up with her duties, and placed on a production/behavior plan by her employer. (13:23-14:5; 129:23-130:11) Michael left the marital home in July 2017, so Tracy solely had to deal with her children's developmental, physical, and emotional health issues that popped up from time to time sometimes requiring doctor and hospital visits. (15:14-24; 23:7-17; 49:4-51:20; 128:19-22 130:8-11) Due to the stress of being a single parent, dealing with her children's health and education needs, dealing with her own mental health from domestic abuse and the assault, and not being able to keep up with her work, Tracy voluntarily left the job at United Healthcare and sought new employment. (128:19-22; 129:2-3) Tracy found

another job as an administrator for a start-up rehab facility. (12:25-13:7) Unfortunately, after a few months, the employer determined that Tracy was not a good fit and employment was terminated in January 2019. (13:8-10; 129:4-13; 12:20-21) At the time of trial, Tracy was not employed, was receiving weekly unemployment compensation benefits of \$400.00, and looking for employment. (12:18-21; 14:6-22; 55:16-20; 437:8-14) During the continued proceedings of trial, Tracy was the victim of a vehicular accident that caused bodily injuries such as a concussion, whiplash, and a flattened spinal cord. (188:5-189:1; 436:6-437:7) The injuries, treatments, and back and neck surgery required have prevented Tracy from looking for new employment. (189:23-190:8; 190:9-191:7; 436:6-22) At trial Tracy testified that she had scheduled an appointment about possibly receiving disability benefits and that her understanding is that her unemployment benefits would be affected by not being able to work/look for work during recovery of her injuries. (194:12-24; 436:23-437:7) Before and during the marriage, Michael has worked off and on as a personal trainer, sales jobs, and security. (218:19-21; 227:3-4; 231:1; 264:20-21; 352:9-354:2; 381:3-383:5) After the birth of Arianna in 2014, Michael was a stay at home parent. (226:19-25; 227:22-23) Since leaving the marital home for the East Coast, Michael has been working at LA Fitness as a general manager earning approximately \$1648.00 to \$2,067.00 in gross income biweekly a year prior to trial. (284:10-286:16; E11,4:284,287) Michael testified at trial that his income had not changed during the year prior to the beginning of trial and throughout its duration of five months. (286:10-16)

Verbal and mental abuse by Michael against Tracy began shortly after the parties married. (17:16-18:9; 46:19-47:2; 136:15-17) This abuse would later intensify into a

pattern of physical abuse beginning around 2016, some of which was witnessed by the children. (18:10-13; 19:15-20; 20:10-21; 133:15-22; 134:8-18) The last instance of physical abuse occurred on July 16, 2017. (20:22-22:7) Michael punched Tracy twice with a closed fist, grabbed and carried her to the garage, then held her there for a significant amount of time before releasing her. (E28,8:33; 21:4-22:7) Following the assault Tracy petitioned for, and was granted, a domestic abuse protection order and filed for dissolution of marriage. (E6,1-8:27; T1-5) On the night of the assault, Michael immediately boarded a bus and left the state for the East Coast. (23:2-17; 359:24-360:7) Michael was arrested for the assault over a year later on August 14, 2018. (E28,7:33) Michael was found guilty beyond a reasonable doubt to 3<sup>rd</sup> Degree Domestic Assault on March 22, 2019. (E28:30,33) He was sentenced to two years of probation, no contact with Tracy except as the District Court sees fit to execute parenting time, successfully complete cognitive programming directed by the probation office, complete alcohol, drug and/or mental health evaluations, counseling, and treatment as determined by the probation office, and attend and complete a domestic abuse intervention program. (E38:1-2:203-204; 269:4-10; 384:1-385:3) Despite immediately leaving the state in the middle of the night after the assault, the children questioning him about the abuse they observed at therapy, and the finding of guilt beyond a reasonable doubt by the County Court, Michael continues to minimize and deny the abuse. (86:24-87:17; E34,1:89; 100:19-24264:16-265:14; 356:11-357:22)

Prior to the assault and separation, the parties' children were in Michael's care while Tracy worked. (145:2-3) While Michael described his care as "structured" to include outside play time, watching educational television, and going to the bookstore,

Tracy testified that the children watched television all day and begged to go outside when she got home from work. (231:11-16; 272:6-12; 145:15-146:6) After the separation, Tracy discovered that the children were extremely developmentally delayed in their education. (49:16-50:5) With Michael out of the marital home and the children's new school, the children's development, specifically their speech and language skills, improved. (50:6-51:17)

To address the domestic abuse in the home and the effect it had on the children, Tracy took the children to family therapist, Michael Keady (hereinafter "Mr. Keady"), for treatment. (79:13-18) Mr. Keady diagnosed the children, on or about July 10, 2018, with adjustment disorder with mixed disturbance of emotion and conduct and, based on the domestic abuse described by the children and Tracy, with post-traumatic stress disorder. (81:10-13) Further, Mr. Keady observed that the children have a lack of attachment to Michael. (E33,1:82,84) In July 2018, Mr. Keady opined that due to the children's diagnosis and Michael's unexplained absence, the children are at risk of a deteriorating mental status and Michael would be at risk of minimizing his opportunity to develop a healthy attachment if contact with Michael was not done through family psychotherapy. (E33,1:82,84) During a therapeutic session involving Michael and the children in August 2018, Mr. Keady observed that Michael refused to respond to his children when they asked why he had not apologized to their mother. (86:24-87:17) Mr. Keady would later find out that Michael had been arrested for assault and, along with Michael's failure to be honest about the assault when asked by Mr. Keady, recommended that it was in the children's best interest that unsupervised visits should be gradual as the children remain vulnerable to anxiety and confusion concerning the domestic abuse. (E34,1:89; 96:22-

98:4) Upon learning about Michael's conviction, Mr. Keady recommended that therapeutic visitation would be in the children's best interest and would allow the children's anxiety to reduce and develop a healthy relationship with Michael. (89:24-90:8; 93:19-95:4)

In completing her petition for a Domestic Abuse Protection Order, on July 17, 2017, Tracy did not check a box requesting a prohibition of Michael communicating with her and the Court ordered the same. (E6,2,6:27) Tracy did this so Michael would be able to contact and call the children. (28:4-16) During the year the Domestic Abuse Protection Order was in effect, July 2017 to July 2018, Michael made few, if any, calls to Tracy to talk to the children. (28:17-22; 414:10-417:23; E45,1-25:414,416; E46,1-27:417) Tracy petitioned to renew the Domestic Abuse Protection Order prior to expiration on July 17, 2018, and again did not check a box requesting a prohibition on communication by Michael. (E7,7:29) The Court again complied with the request in its order renewing the Domestic Abuse Protection Order. (E7,2:29) Following the filing of the complaint for dissolution of marriage, the District Court, on July 27, 2018, issued a temporary order granting Michael telephonic visitation conducted through the FaceTime app to occur for 30 minutes on Tuesday and Thursday evenings. (T16-17) Tracy facilitated Michael's communication with the children through the FaceTime app. (35:8-36:2) A subsequent order was issued on August 14, 2018, allowing Michael Labor Day visitation in Lincoln. (T66) Michael was arraigned in his criminal assault case on August 15, 2018, and the County Court instituted a no-contact order between Michael and Tracy. (E28,4:33) Based on a conversation she had with a county prosecutor, Tracy understood the County Court no-contact order required no contact between the parties regardless of the District Court

parenting time order. (33:12-35:7) Michael requested the County Court to remove the no-contact order on September 28, 2018, however, the County Court denied that request. (E28,10:33) Michael failed to fulfill his Labor Day visitation and requested it be made up, but the District Court overruled the request and suspended further parenting time due to Michael's assault case. (T24, T66) On October 12, 2018, the District Court allowed Michael FaceTime parenting time to resume subject to the no-contact with Tracy being modified by the County Court. (T66) This order was not modified. On November 16, 2018, the County Court modified the no-contact order to allow Michael to have FaceTime parenting time, but continued the no-contact order to Tracy. (E28,15:33) On the same day, the District Court allowed Michael FaceTime parenting time. (T67) Friends and family were unwilling to help Tracy facilitate the FaceTime visitation as ordered, however, Mr Keady, the children's therapist, was willing to facilitate FaceTime visitation so that the no-contact order would not be violated. (36:3-12; 36:21-23) Michael, however, did not take the offer and made little to no effort to try and facilitate FaceTime visitation. (37:8-15; 90:20-91:6; 328:9-17; 328:24-329:3; 329:4-331:13) On June 27, 2019, the County Court sentenced Michael and continued the no-contact order except as authorized by the District Court. (E38,1:203,204) On July 16, 2019, the District Court authorized and allowed Michael to contact Tracy for purposes of exercising telephonic parenting time. (T43) Telephonic parenting time resumed regularly except for a situation where Tracy's phone was hacked or shut off due to an inability to pay the bill. (418:2-419:10; 429:18-430:15; 441:8-441:25)

Pursuant to local rule, the parties submitted a Pretrial Memorandum which discloses all witnesses and exhibits a party intends to use at trial. L. R. §3-9(D) of the

Third Judicial District of Nebraska. L. R. §3-9(D) also provides for a continuing duty of the parties to update the information on the Pretrial Memorandum, however, no update may be made 5 or less days prior to trial without consent of the other party or leave of the court. *Id.* Michael submitted his Pretrial Memorandum on July 3, 2018. (T70) Dr. McNeese was not listed as a witness nor was his affidavit as an exhibit. (T70) Further, at no point prior to trial did Michael update and amend his Pretrial Memorandum. At trial, Michael called Dr. Rick McNeese to testify over the continuing objection of Tracy. (108:20-25) The District Court took the objection under advisement and allowed the testimony to continue. (108:13-17) The District Court also conditionally took the offer of an exhibit prepared by Dr. McNeese under advisement. (113:20-21; E26,1-9:111,113) Dr. McNeese evaluated Michael for parental fitness, however, at no time did he evaluate the children or Tracy. (114:19-21; 115:13-23) Despite not having evaluated Tracy or the children, Dr. McNeese provided a recommendation as to parenting time and opined that Tracy was interfering with Michael's relationship with the children. (E26,9:111,113) Nowhere in Dr. McNeese's testimony or report does he reference Michael's criminal assault case. (E26,1-9:111,113)

On August 14, 2018, the District Court entered a stipulated order finding Michael in contempt for violating the temporary order as it pertained to paying his share of daycare expenses. (T19-23; 275:9-25) An agreement was reached that would allow Michael to purge the contempt by paying \$300 per month until \$3,971.20 was paid in full. (T20) At trial Michael admitted he was behind on making payments under the purge plan. (276:20-22; 279:2-4; 313:23-314:12) Despite earning significantly more than Tracy, Michael states he cannot make the payment. (279:5-6)

The parties acquired very little assets during the marriage, but incurred a significant amount of debt. (T52-53) During the marriage, Michael received an inheritance of \$11,321.72 that was used to pay the marital expenses. (122:20-123:16; E17,1-7:236) Michael claims that \$5800.00 of the funds were diverted into Tracy's personal account, but was uncertain how the funds were used. (235:17-18) Tracy's bank statement from the same period of time shows the \$5,800.00 of funds transferred into her personal account and the expenses paid on behalf of the family such as food, groceries, utilities, cell phone bill, personal care services, toys, rent, clothing, credit card payments, insurance, medical, and fuel charges. (E17,1-7:236; 433:1-435:7) Despite this evidence, the District Court relied upon and accepted Michael's proposed property division which carved out \$5,800.00 as "dissipated" assets which lowered the ultimate division to the parties. (E43,1:407,408) This division resulted in an equalization payment by Michael to Tracy in the amount of \$7,590.39. (T53)

On October 25, 2019, the District Court entered a Decree of Dissolution of Marriage and awarded Tracy legal and physical custody of the children and awarded Michael parenting time of one weekend a month in Nebraska, alternating Spring Break/Christmas Break holidays in his state of residence, and two separate two-week periods of parenting time in the Summer in his state of residence. (T47-49, T56-58) Child support was calculated based on Tracy's highest earnings despite being unemployed and injured. (T50-51) The Court's division of marital property resulted in an equalization payment by Michael to Tracy in the amount of \$7,590.39. (T53) The Court amended the purge plan against Michael to allow Michael additional time to get caught up on the balance owed. (T50) The Court found Tracy in contempt for purposefully and willfully



preventing Michael from conducting FaceTime parenting time. (T49) The Court awarded attorney fees to Michael in the amount of \$2,500.00 to purge the contempt. (T49) The District Court found that the Ex Parte Domestic Abuse Protection Order issued by Tracy against Michael should remain in place, but modified to allow Michael to pick up and return the children to Tracy's home and daycare/school. (T53) With the exception of the attorney fees awarded to Michael for the contempt purge, the Court did not award any other attorney fees to either party. (T54)

## **SUMMARY OF THE ARGUMENT**

The District Court erred by fashioning a visitation schedule to Michael that was not reasonable nor in the children's best interests. The evidence of domestic abuse, criminal assault, Michael's refusal to accept how his actions have affected the children, and the distance and time Michael chose to be away from the children, when applied to the statutory analysis factors, find that therapeutic parenting time would be in the children's best interests.

The District Court erred by allowing Dr. McNeese to testify despite not being disclosed prior to trial on Michael's pretrial statement. Further, the Court erred by allowing an affidavit prepared by Dr. McNeese into evidence which was also not disclosed on Michael's pretrial statement. The District Court relied on Dr. McNeese's testimony regarding parenting time despite evidence to the contrary. Tracy was not able to prepare cross examination of Dr. McNeese. The District Court's sole reliance on the testimony and evidence provided by Dr. McNeese and Tracy's inability to prepare for trial was to her detriment and was prejudicial.

The District Court erred by developing a child support calculation that imposes an earning capacity to Tracy that is contrary to the evidence. The evidence provides that Tracy has been, and continues to be, unemployed; has made significant attempts at finding employment; has incurred injuries that currently prevent her from employment; and was unable to sustain the employment from the earning capacity imposed.

The District Court erred by inequitably dividing the marital estate. The evidence establishes an inheritance received by Michael was used by Tracy for the benefit of the

marriage rather than dissipated for personal gain. A proper division would have provided a greater equalization payment from Michael to Tracy.

The District Court erred by finding Tracy in contempt of a temporary order and ordering a purge plan that included \$2,500.00 in attorney fees. The evidence provides that a no-contact order prevented Tracy from participating directly in Michael's parenting time and that Michael refused to take opportunities to facilitate parenting time through the children's therapist. Tracy's state of mind is such that her actions were based on what she was told she could and could not do under the no-contact order and in no way was willfully obstructing Michael's parenting time.

The District Court erred by not awarding Tracy reasonable attorney fees. The income disparity between the parties and general equities of the situation would result in the award of attorney fees to Tracy.

## ARGUMENT

### I. THE DISTRICT COURT ABUSED ITS DISCRETION BY AWARDING SIGNIFICANT PARENTING TIME TO MICHAEL AND PROVIDING VAGUE PARENTING PLAN PROVISIONS.

The District Court awarded Michael parenting time consisting of non-therapeutic visitation one weekend a month in Lincoln, alternating Spring Break/Christmas Break to be held in Maryland/Virginia, and two separate two-week visits during the Summer. (T47-49, T56-58)

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356 (2019). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id.* However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

The trial court has discretion to set a reasonable parenting time schedule. *Wolter v. Fortuna*, 27 Neb.App 166 (2019). The determination of the reasonableness of a parenting plan is to be made on a case-by-case basis. *Id.* Parenting time relates to

continuing and fostering the normal parental relationship of the noncustodial parent. *Id.* The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id.* Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Id.*

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following:

(a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child;

(d) Credible evidence of abuse inflicted on any family or household member...;  
and

(e) Credible evidence of child abuse or neglect or domestic intimate partner abuse. Neb. Rev. Stat. § 43-2923(6) (Reissue 2016).

Other factors which a court may consider are the moral fitness of the parents, respective environments offered by each parent, the emotional relationship between the child and parents, the effect on the child as the result of continuing or disrupting of existing relationships, the attitude and stability of each parent's character, the parent's capacity to provide physical care and satisfy educational needs of the child and the

general health, welfare, and social behavior of the child. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 459 (1996).

Further, pursuant to Neb. Rev. Stat. §43-2932 (Reissue 2016):

(1) When the court is required to develop a parenting plan:

(a) If a preponderance of the evidence demonstrates, the court shall determine whether a parent who would otherwise be allocated custody, parenting time, visitation, or other access to the child under a parenting plan:

(iii) Has committed domestic intimate partner abuse; (and)

(b) If a parent is found to have engaged in any activity specified by subdivision (1)(a) of this section, limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm. The limitations may include, but are not limited to:

(ii) Supervision of the parenting time, visitation, or other access between a parent and the child;

(iii) Exchange of the child between parents through an intermediary or in a protected setting;

(iv) Restraints on the parent from communication with or proximity to the other parent or the child;

(vi) Denial of overnight physical custodial parenting time; (or)

(ix) Any other constraints or conditions deemed necessary to provide for the safety of the child, a child's parent, or any person whose safety immediately affects the child's welfare.

(3) ... The parent found to have engaged in the behavior specified in subsection (1) of this section has the burden of proving that legal or physical custody, parenting time,

visitation, or other access to that parent will not endanger the child or the other parent. Neb. Rev. Stat. §43-2932 (Reissue 2016).

In awarding Michael substantial parenting time, the District Court relied solely on a report provided by Michael's therapist, Dr. McNeese, over Tracy's objection. (T48; E26,1-9:111,113) Dr. McNeese's report is based on an evaluation that took place September 27<sup>th</sup> and October 1, 2018. (E26,1-9:111,113) This evaluation took place after Michael was arrested for domestic assault but before his conviction and does not take into account, mention, or otherwise analyze this criminal case, the Domestic Abuse Protection Order, or any other prior incidence of domestic abuse. Additionally, the report failed to analyze the children's current feelings toward their father, Michael willfully leaving the marital home without notice to the children, Michael's failure to respond to requests by Tracy and the children for contact after he left and before the no-contact order was put in place, Michael's failure to exercise parenting time through FaceTime app facilitated by Mr. Keady, and Michael's failure to participate in family therapy to address the children's concerns and trauma incurred from the abuse. Finally, Dr. McNeese's report does not evaluate the children or Tracy to make a responsible opinion that Tracy is alienating Michael's attachment to the children or frustrating his exercise of parenting time. (E26,1-9:111,113)

The District Court's sole reliance of Dr. McNeese's testimony and report in determining parenting time is a clear abuse of discretion when taken into account with the overwhelming evidence of domestic abuse by Michael. (17:16-18:9; 18:10-13; 19:15-20; 20:10-21; 20:22-22:7; 21:4-22:7; 46:19-47:2; 133:15-22; 134:8-18; 136:15-17; E28,8:33) This abuse of discretion is exacerbated by the District Court's failure to take into account

Mr. Keady's opinion regarding the children's current emotional wellbeing including the children's lack of attachment to Michael, the length of time after the assault and before the no-contact order Michael refused to contact the children, the lack of responsibility Michael has taken for his actions, the appropriate treatment for the children to develop a healthy relationship with their father, and the type of parenting time that would be in the children's best interest. In the Decree of Dissolution of Marriage, the District Court makes one mention of Mr. Keady and it related to the one time Michael availed himself of in-person parenting time. (T48) There is no analysis to Mr. Keady's extensive testimony and report. (79:13-18; 81:10-13; 86:24-87:17; 89:24-90:8; 93:19-95:4; 96:22-98:4; E33,1:82,84; E34,1:89) Mr. Keady is the only therapist that visited with all interested parties, evaluated the parties, and made an opinion with regard to the children's best interest. *Id.* Failing to address this significant portion of evidence is an abuse of discretion.

Although the best interests of the children standards are not exhaustive and no particular standard is weighed greater than another, the District Court also abused its discretion by failing to evaluate and analyze the standards. Specifically, the District Court disregarded the emotional relationship between the children and Michael as previously argued. After the assault and leaving the state, Michael refused to communicate or otherwise contact Tracy and the children. (374:5-13; 414:10-417:23; E45,1-25:415,416; E46,1-27:417) This standard was further disregarded by the District Court's failure to address Michael's purposeful denial of exercising FaceTime parenting time offered to be facilitated by Mr. Keady. (36:3-12; 36:21-23; 37:8-15; 90:20-91:6; 328:9-17; 328:24-329:3; 329:4-331:1) Since Tracy was unable to facilitate this parenting time due to a no-



contact order from Michael's criminal case, utilizing Mr. Keady for these visits would have provided Michael not only the ability to visit with the children, but also work on the emotional trauma he has caused the children. Additionally, the great improvement in behavior and education the children have made under Tracy with their school/daycare was not mentioned and Michael's extensive length of parenting time would inhibit this continued improvement. (49:16-51:17) No testimony was elicited that would suggest that Michael's living situation in Maryland/Virginia/Washington D.C. even afforded his ability to care for the children during his visitations, but it is concerning that even the District Court is unsure where exactly Michael resides since each location is mentioned in the Decree. (T48, T57) When taken together, the District Court clearly abused its discretion in implementing parenting time that did not provide for the children's emotional health and wellbeing while reestablishing and developing the healthy relationship with Michael and his children.

The District Court also failed to adequately address the domestic abuse during the marriage. When the court, by a preponderance of the evidence, finds a parent to have committed domestic intimate partner abuse, limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm. Neb. Rev. Stat. §43-2932 (Reissue 2016). Limitation may include supervision of visitation, exchange of the child through an intermediary or in a protected setting, restraints on communication with the other parent, denial of overnight parenting time, or any other conditions necessary to protect the child, parent, or any person whose safety affects the child's welfare. *Id.* A parent found to have committed abuse has the burden of proving that visitation will not endanger the child or the other parent. *Id.* The District Court made no finding

whatsoever that a preponderance of the evidence established Michael committed domestic intimate partner abuse, whether or not limitations to visitation would be required, and why limitations are or are not necessary and required. Further, Michael has failed to satisfy his burden of evidencing visitation will not endanger the children or Tracy and the District Court failed to make any finding of the same. It is overwhelmingly clear that Michael committed domestic intimate partner abuse. It is also evidenced that the children have been harmed by the pattern of abuse and continue to question him concerning his actions. Michael has failed to address his children's trauma or concerns. In fact he dismisses them. (17:16-18:9; 46:19-47:2; 136:15-17; 18:10-13; 19:15-20; 20:10-21; 133:15-22; 134:8-18; 20:22-22:7; E28,8:33; 21:4-22:7; E6,1-8:27; 81:10-13; E33,1:82,84; 86:24-87:17; E34,1:89; 96:22-98:4; 89:24-90:8; 93:19-95:4) The failure of the District Court to address the provisions required of it under Neb. Rev. Stat. §43-2932 (Reissue 2016).

In addition to failing to address the children's emotional wellbeing with regard to their father's abuse, the District Court also failed to consider the children's physical health. The District Court's parenting plan requires the children to leave Nebraska, presumably by airplane, to visit Michael in the Maryland/Virginia/Washington D.C. area for two separate two week periods of time in the Summer and either Christmas or Spring Break in alternating years. (T57-58) The parties' eldest daughter, Santana, suffers from an autoimmune issue and exacerbated asthma that have required many hospitalizations and has an extensive respiratory distress plan in place to address it that Michael is unaware of due to his absence. (422:23-423:5; 423:15-424:9; 443:16-445:15) Despite this information and seeing the medical bills provided for these hospitalizations, and requests

by Tracy for Michael to visit his daughter during these hospitalizations, Michael denies that Santana is ill. (49:4-14; 231:5-18; E45,1-25:415,416; E46,1-27:417) Requiring this child to fly on an airplane and visit with a parent unfamiliar with her health conditions and treatment is an abuse of discretion.

Additionally, the parenting plan established by the District Court provides for a vague and ambiguous transition plan. (T57-59) In Section 10 of the parenting plan, the District Court gives Michael the authority to select the dates and times of pickup/dropoff. (T57) In Section 15, the parenting plan provides that Michael is responsible for pickup and return of the children. (T59) The only stipulation in the parenting plan as to approximately when Michael is permitted to exercise parenting time is “Friday evening to Sunday evening”. (T57) The term “evening” is not defined in the parenting plan. Taken to extreme measures, Michael could theoretically demand his parenting time begin at 12:00pm on Friday and end at 11:59pm on Sunday. Further, there is no provision as to where pickup/dropoff is to take place. Under the circumstances of this case where significant and long term domestic abuse took place, Tracy should be provided with an exchange location in a protected place, like a law enforcement department. Neb. Rev. Stat. §43-2932(1)(b)(iii) (Reissue 2016). The failure of the District Court to address and provide for the safety of Tracy and the children under the Parenting Act is an abuse of discretion.

Pursuant to the evidence presented at trial, an appropriate parenting time schedule would have included therapeutic and telephonic visitation. Failing to provide for therapeutic visitation, an appropriate exchange location to protect Tracy from further

abuse, and allowing the children to travel an extensive distance for extended periods of time at such a young age is an abuse of discretion.

## **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOWING A NON-DISCLOSED WITNESS AND EXHIBIT INTO EVIDENCE.**

During trial, Michael called Dr. Rick McNeese to testify on his behalf. (103:13-16) This was immediately met with an objection by Tracy for Michael's failure to disclose the witness in his pretrial memorandum. (103:18-23) The District Court took the objection under advisement and allowed Dr. McNeese to testify. (108:13-17) Dr. McNeese laid foundation for his affidavit to be entered into evidence which Tracy also objected to and the District Court conditionally took under advisement. (113:20-21; E26,1-9:111,113) The District Court stated in the Decree following trial that it would receive the affidavit into evidence. (T48) While the Decree does not specifically rule on Tracy's objection to Dr. McNeese's testimony, it can be inferred from the acceptance of his affidavit and the District Court's sole reliance on Dr. McNeese's opinion that Tracy's objection was overruled. (T48)

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109 (2017). It is within the trial court's discretion to admit or exclude the testimony of an expert witness, and a trial court's ruling in receiving or excluding an expert's opinion will be reversed only when there has been an abuse of discretion. *Zarp v. Duff*, 238 Neb. 324 (1991). In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly

prejudiced a substantial right of the complaining party. *O'Brien*, 298 Neb. 109 (2017). An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

It is overwhelmingly clear that the District Court abused its discretion by allowing Dr. McNeese to testify. Pursuant to local rule, the parties submitted a Pretrial Memorandum which discloses all witnesses and exhibits a party intends to use at trial. L. R. §3-9(D) of the Third Judicial District of Nebraska. L. R. §3-9(D) also provides for a continuing duty of the parties to update the information on the Pretrial Memorandum, however, no update may be made 5 or less days prior to trial without consent of the other party or leave of the court. *Id.* Michael submitted his Pretrial Memorandum on July 3, 2018. (T70) Dr. McNeese was not listed as a witness nor was his affidavit as an exhibit. (T70) Further, at no point prior to trial did Michael update and amend his Pretrial Memorandum. At the trial, Michael's counsel stated that she did not expect to call Dr. McNeese and even notified Tracy's counsel at 11:00am the day before trial she would only be calling her client, but a couple of hours later discovered Dr. McNeese would be available and notified Tracy's counsel the afternoon prior to trial. (103:18-108:25) Allowing Dr. McNeese to testify without disclosure prior to trial prejudices Tracy and her ability to fully prepare for trial.

The prejudice against Tracy and the deprivation of a just result is further enhanced when taking into account that the District Court solely relied on Dr. McNeese's testimony and affidavit in determining parenting time as well as the contempt action

against Tracy. (T48-49) Dr. McNeese evaluated Michael for parental fitness, however, at no time did he evaluate the children or Tracy. (114:19-21; 115:13-23) Despite not having evaluated Tracy or the children, Dr. McNeese provided a recommendation as to parenting time and opined that Tracy was interfering with Michael's relationship with the children. (E26,9:111,113) Nowhere in Dr. McNeese's testimony or affidavit does he reference Michael's criminal assault case. (E26,1-9:111,113)

The District Court abused its discretion by allowing Dr. McNeese to testify and entering into evidence his affidavit. Allowing a non-disclosed witness to testify and then relying solely on their testimony deprives the objecting party of a just result.

### **III. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING TRACY IN CONTEMPT.**

On March 22, 2019, Michael filed a Motion for Order to Show Cause alleging Tracy had violated a temporary order regarding FaceTime parenting time ordered on July 28, 2018 and judge's notes from hearings conducted on October 12, 2018, November 16, 2018, and March 18, 2019 that were never formalized into an order. (T33-35)

In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *Krejci v. Krejci*, 304 Neb. 302 (2019). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power,

elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party. *Id.* Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Id.* Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence. *Id.*

After the District Court issued its July 28, 2018, temporary order granting Michael telephonic visitation conducted through the FaceTime app to occur for 30 minutes on Tuesday and Thursday evenings, Tracy facilitated Michael's communication with the children through the FaceTime app. (T16-17; 35:8-36:2) Michael was arraigned in his criminal assault case on August 15, 2018, and the County Court instituted a no-contact order between Michael and Tracy. (E28,4:33) Based on a conversation she had with a county prosecutor, Tracy understood the County Court no-contact order required no contact between the parties regardless of the District Court parenting time order. (33:12-35:7) Michael requested the County Court to remove the no-contact order on September 28, 2018, however, the County Court denied that request. (E28,10:33) The District Court suspended further parenting time on October 1, 2018, due to Michael's assault case. (T24, T66) On October 12, 2018, the District Court allowed Michael FaceTime parenting time to resume subject to the no-contact order being modified in

Michael's criminal case. (T66) Since the no-contact order subsequently was not modified, parenting time did not take place. On November 16, 2018, the County Court in Michael's criminal case modified his bond stating, "Can facetime children consistent with District Court order on Tuesday and Thursday. No contact with Tracy Gandara Moore". (E28,15:33) On the same date, the District Court allowed Michael to begin FaceTime parenting time. (T67). Tracy continued to not be able to facilitate the FaceTime parenting time due to the no-contact order. Tracy's friends and family were unwilling to help Tracy facilitate the FaceTime visitation as ordered, however, Mr Keady, the children's therapist, was willing to facilitate FaceTime visitation so that the no-contact order would not be violated. (36:3-12; 36:21-23) Michael, however, did not take the offer and made little to no effort to try and facilitate FaceTime visitation. (37:8-15; 90:20-91:6; 328:9-17; 328:24-329:3; 329:4-331:13) On March 18, 2019, the District Court pronounced that FaceTime parenting time would be conducted at Michael's counsel's office and requested Michael's counsel to draft the order. (T67) It does not appear on the record that that order was ever prepared, executed, or entered. (T67) On June 27, 2019, the County Court sentenced Michael and continued the no-contact order except as authorized by the District Court. (E38,1:203,204) At trial on June 28, 2019, the District Court pronounced it would allow Michael to contact Tracy for purposes of parenting time. (370:11-372:12) On July 16, 2019, the District Court authorized and allowed Michael to contact Tracy for purposes of exercising telephonic parenting time. (T43, T68) Telephonic parenting time resumed regularly except for a situation where Tracy's phone was hacked or shut off due to an inability to pay the bill. (418:2-419:10; 429:18-430:15; 441:8-441:25)



It is clear from the evidence that Tracy did not willfully prevent Michael from exercising FaceTime parenting time. The evidence shows that prior to the criminal court's no-contact order on August 15, 2018, Tracy facilitated the parenting time ordered on July 28, 2018. The criminal court's no-contact order, which prevented Tracy and Michael having any contact with each other, continued from August 15, 2018 until it was modified on June 28, 2019. (T16-17; 35:8-36:2; E28,1-30:33; T24, T66-67; E38,1:203,204; T43, T68) During this period of time, Tracy's thought process was, as she was told by a County Prosecutor, that a criminal court order trumps a civil court order. (33:12-35:7) Tracy could not willfully violate the District Court parenting time order because she believed she could not legally follow it. Once the no-contact order was modified, Tracy facilitated the ordered telephonic parenting time. (392:13-22) There were minor occasions outside of Tracy's control that prevented her from facilitating the parenting time. These were due with issues surrounding her cell phone being hacked or shut off by the telephone company for non-payment. (392:23-393:7) When able, Tracy used other people's phones to facilitate the parenting time. (393:1-23) Despite Tracy trying to facilitate telephonic parenting time after the no-contact order was modified by the District Court on June 28, 2019, it was Michael who refused to participate because he thought the original no-contact order was still in place. (400:9-401:1)

From August 15, 2018 until June 28, 2019 when the no-contact order was in place, Michael had the ability to exercise parenting time. While Tracy could not facilitate it, Mr. Keady volunteered to do so and Michael refused. (36:3-12; 36:21-23; 37:8-15; 90:20-91:6; 328:9-17; 328:24-329:3; 329:4-331:13)

The District Court's factual finding that Tracy willfully refused Michael's parenting time is clear error and finding Tracy in contempt is against the great weight of the evidence and is an abuse of discretion.

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN CALCULATING CHILD SUPPORT.**

In calculating child support, the District Court determined Tracy's earning capacity at \$58,000.00 per year rather than her current unemployment situation finding such a calculation inequitable. (T50) Without referencing the evidence, the District Court accepted Michael's proposed child support calculation worksheet. (T50, T62) Under this calculation, Michael would be required to pay monthly child support for two minor children in the amount of \$691.00 and \$426.00 when only one minor child remained. (T50, T62)

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356 (2019). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id.* However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* A judicial abuse of discretion exists if the reasons or rulings of a

trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

The District Court abused its discretion in calculating child support in two manners. First, there was an abuse of discretion by utilizing prior employment to determine Tracy's earning capacity in light of evidence that suggests she will never be able to earn that sum in the near future. Second, if the earning capacity determination is found to be proper, the calculation worksheet adopted by the District Court fails to calculate that determination accurately.

As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines. *Gress v. Gress*, 274 Neb. 686 (2007).

#### **A. Tracy's Earning Capacity**

If applicable, earning capacity may be considered in lieu of a parent's actual, present income. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources. When imputing income to a parent, the court shall take into consideration the specific circumstances of the parents, to the extent known. Those factors may include the parent's residence, employment and earnings history, job skills, educational attainment, literacy, age, health, and employment barriers, including criminal record, record of seeking work, prevailing local earning levels, and availability of employment. Neb. Ct. R. §4-204(E) (rev. 2020). Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Hall v. Hall*, 26 Neb.App. 877 (2019). When earning capacity is used as a basis for an initial

determination of child support under the Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. *State v. Porter*, 259 Neb. 366 (2000).

From 2016 to sometime in 2018, Tracy was employed by United Healthcare as a network manager where she earned \$58,000.00 per year. (13:11-21) Her employment with United Healthcare required 12-14 hour workdays, weekends, and significant data analysis requiring critical attention to detail. (13:24-14:2; 130:2-3) Tracy admitted she was overwhelmed with the work, unable to keep up with her duties, and placed on a production/behavior plan by her employer. (13:23-14:5; 129:23-130:11) Michael left the marital home in July 2017, so Tracy solely had to deal with her children's developmental, physical, and emotional health issues that popped up from time to time sometimes requiring doctor and hospital visits. (15:14-24; 23:7-17; 49:4-51:20; 128:19-22 130:8-11) Due to the stress of being a single parent, dealing with her children's health and education needs, dealing with her own mental health from domestic abuse and the assault, and not being able to keep up with her work, Tracy voluntarily left the job at United Healthcare and sought new employment. (128:19-22; 129:2-3) Tracy found another job as an administrator for a start-up rehab facility however, after a few months, the employer determined that Tracy was not a good fit and employment was terminated in January 2019. (12:20-21; 12:25-13:10; 129:4-13) Unfortunately, there is no evidence to establish Tracy's pay at this employment. At the time of trial, Tracy was not employed, was receiving weekly unemployment compensation benefits of \$400.00, and looking for employment. (12:18-21; 14:6-22; 55:16-20; 437:8-14) During the continued proceedings of trial, Tracy was the victim of a vehicular accident that caused bodily injuries. (188:5-

189:1; 436:6-437:7) The injuries, treatments, and surgery required have prevented Tracy from looking for new employment. (189:23-190:8; 190:9-191:7; 436:6-22) At trial Tracy testified that she had scheduled an appointment about possibly receiving disability benefits and that her understanding is that her unemployment benefits would be affected by not being able to work/look for work during recovery of her injuries. (194:12-24; 436:23-437:7) Additionally, there was evidence to suggest that Tracy was not being able to attain employment due to judgments for marital debt causing her to fail credit employment checks. (437:23-438:16) The District Court, in the Decree, states Tracy “was unable to name any place she has applied for when asked on cross-examination.” (T50) The record reflects that Michael’s counsel never asked for any specific name of a place Tracy applied to, however, on direct examination Tracy stated she had applied to a variety of places including Nelnet. (14:6-22) Tracy testified on September 3, 2019, that, pursuant to her unemployment compensation requirement, she had applied to over 50 or 60 jobs in the past 9 to 10 months. (437:8-14)

Tracy admits she voluntarily left the job at United Healthcare in 2018 that paid \$58,000.00 per year, however, she did so because she was unable to handle the work load and it was taking a toll on her mental health and her ability to care for the children. The District Court abused its discretion by failing to analyze the circumstances surrounding Tracy voluntarily leaving the employment pursuant to Neb. Ct. R. §4-204(E) (rev. 2020).

The District Court further abused its discretion based on the lack of evidence that Tracy was capable of realizing \$58,000 per year through reasonable effort. *State v. Porter*, 259 Neb. 366 (2000). The evidence establishes that Tracy has been unemployed since January 2019 and continued to seek employment throughout the conclusion of trial

in September 2019. (437:8-14) Additionally, there was evidence Tracy was injured from a car accident requiring surgeries that would continue to prevent her to work. (188:5-189:1; 189:23-191:7; 436:6-437:7) There was no evidence, nor even an allegation by Michael, that Tracy was purposefully not working. The contention by the District Court that allowing a child support calculation based on Tracy's actual income would be inequitable is not only without merit, it contradicts the analysis of factors outlined under the court rules and was an abuse of discretion. Neb. Ct. R. §4-204(E) (rev. 2020).

### **B. Inaccurate Calculation**

If attributing an earning capacity of \$58,000.00 per year to Tracy was proper, the District Court still abused its discretion in calculating child support.

Instead of developing its own calculation based on its decision to attribute earning capacity to Tracy, the District Court instead adopted Michael's proposed child support calculation. (T62; E14,1:290) Instead of attributing \$4,833.33 monthly income for Tracy ( $\$4,833.33 \times 12 \text{ months} = \$58,000.00$ ), this calculation inputs \$4,977.74 for Tracy. This monthly income amount contradicts the earning capacity determination outlined in the Decree and was an abuse of discretion. (T50)

This child support calculation contains a further error when viewing what Michael has listed for a deduction for health insurance. The District Court's reliance on Michael's proposed calculation despite the clear evidence to the contrary is an abuse of discretion.

The increased cost to the parent for health insurance for the child(ren) of the parent shall be prorated between the parents. When worksheet 1 is used, it shall be added to the monthly support from line 7, then prorated between the parents to arrive at each party's share of monthly support on line 10 of worksheet 1. The parent requesting an

adjustment for health insurance premiums must submit proof of the cost for health insurance coverage of the child(ren). The parent paying the premium receives a credit against his or her share of the monthly support. If not otherwise specified in the support order, "health insurance" includes coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment. Neb. Ct. R. §4-215(A) (rev. 2020).

Ordinarily the amount of health insurance deducted on a party's wage statement includes the premiums paid on behalf of the party and children. Since a party is entitled to a credit for only the portion of health insurance (s)he pays for insuring the children, evidence is required to determine what that amount is. In this instance, under the guidelines, Michael must submit proof of the cost for health insurance coverage of the children if he requests the adjustment on the calculation. Michael failed to elicit testimony or documentary evidence of the coverage and it is plain error for the District Court to provide an adjustment on the calculation. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Osantowski v. Osantowski*, 298 Neb. 339 (2017).

Even if it can be determined that Michael's wage statements entered into evidence provided the proof necessary of the cost of health insurance coverage, the District Court abused its discretion by adopting a calculation that does not conform to the evidence.

Michael's child support calculation adopted by the District Court provides him, on Line 2.f, a deduction of \$186.33 per month for health insurance premiums he pays for himself. (T62) Additionally, Line 10 of the calculation provides Michael a credit of

\$331.50 per month for health insurance premiums he pays for the children. (T62) Adding these figures, Michael allegedly pays approximately \$517.83 in health insurance premiums for himself and the children each month which should be reflected on Michael's wage statements. Michael, however, only has \$128.54 deducted biweekly from his pay for dental, medical, and vision insurance, or approximately \$278.50 per month. (E11,1-3:284,287) Michael's wage statement evidence presented for the calculation of child support and health insurance adjustment credit contradict what the District Court adopted as the child support calculation worksheet. The District Court's adoption was an abuse of discretion.

#### **V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DIVIDING THE MARITAL ESTATE.**

The District Court divided the marital estate by adopting Michael's proposed division of assets and debts finding it more accurate. (T53, T63) The total marital debt was determined to be \$20,980.78. (T63) The District Court attributed \$5,800 from an inheritance Michael received as the only marital asset and divided it accordingly. (T63) This division resulted in an equalization payment by Michael to Tracy in the amount of \$7,590.39. (T53, T63)

In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Burgardt v. Burgardt*, 304 Neb. 356 (2019). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* In a review de novo on the record, an appellate court is required to



make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id.* However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

Tracy does not take issue with the District Court's assessment of the marital debts listed on the adopted property division. Tracy objects to the District Court's finding that \$5,800 of Michael's inheritance was "dissipated". (T63)

During the marriage, Michael received an inheritance of \$11,321.72 that was deposited into the parties' joint bank account on February 7, 2017. (122:20-123:16; E16,1-6:234) Michael claims that \$5800.00 of the funds were diverted into Tracy's personal account, but was uncertain how the funds were used. (235:17-18; E17,1-7:236) Tracy's testimony and bank statement from the same period of time shows \$5,800.00 transferred into her personal account from the parties joint account and a variety of expenses paid on behalf of the family such as food, groceries, utilities, cell phone bill, personal care services, toys, rent, clothing, credit card payments, insurance, medical, and fuel charges. (E17,1-7:236; 433:1-435:7) Despite this evidence, the District Court relied upon and accepted Michael's proposed property division which carved out \$5,800.00 as "dissipated" assets which lowered the ultimate division to the parties. (E43,1:407,408; T53, T63)

The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Burgardt v. Burgardt*, 304 Neb. 356 (2019); Neb. Rev. Stat. § 42-365 (Reissue 2016). Under § 42-365, the equitable division of property is a three-step process. *Id.* The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. *Id.* The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Id.*

As a general rule, all property accumulated and acquired by either party during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Id.* Exceptions include property that a spouse acquired prior to the marriage or by gift or inheritance. *Id.* Setting aside nonmarital property is simple if the spouse possesses the original asset but can be problematic if the original asset no longer exists. *Id.* Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. *Id.*

It's unclear whether Michael contends that the \$5,800.00 transferred to Tracy's personal account is non-marital property he is entitled to, marital property that Michael contends still existed at the time the parties separated, or is marital property that was not used to benefit the family.

The cited case law clearly suggests that the inheritance began as non-marital property, but became marital property once it was commingled in the joint account and then a portion transferred to Tracy's personal account.

"Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Anderson v. Anderson*, 27 Neb.App. 547 (2019). As a remedy, marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Id.*

While it could be argued that in February 2017 the marriage was going through an irretrievable breakdown due to the building emotional and physical abuse, it is clear that Tracy's use of the funds were not for a selfish purpose, but rather to benefit the family. (E17,1-7:236) Michael is unable to claim that food and grocery purchases, rent and utility payments, car payments, credit card payments, medical payments, fuel and insurance payments, and toy purchases could be categorized as selfish purchases unrelated to the marriage. (E17,1-7:236)

The District Court's conclusion that Tracy dissipated \$5,800.00 of Michael's inheritance does not conform to the evidence and is an abuse of discretion. Removing \$5,800 as an asset of the marriage would only leave the division of marital debt. Equally dividing the marital debt would require Michael to provide an equalization payment to Tracy in the amount of \$10,490.39.

## **VI. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT AWARDING ATTORNEY FEES TO TRACY.**

With the exception of awarding attorney fees to Michael as a purge of contempt issued against Tracy, the District Court made no other award for attorney fees. (T54)

Under the circumstances of this matter, attorney fees are merited and should have been awarded to Tracy.

Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Moore v. Moore*, 302 Neb. 588 (2019) Attorney fees shall be awarded against a party who alleged a claim or defense that the court determined was frivolous, interposed any part of the action solely for delay or harassment, or unnecessarily expanded the proceeding by other improper conduct. *Id.* Additionally, in dissolution cases, as a matter of custom, attorney fees and costs are awarded to prevailing parties. *Id.* Finally, a uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. *Id.* In an action involving a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Id.* In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Id.*

This dissolution and custody case lasted from August 2017 to October 2019, required three days of trial spread out over nearly 4 months, included a protection order hearing during trial, various show cause and contempt actions, interrupted by Michael's domestic assault criminal case, and required the use of a therapist for the children. Additionally, Michael refused to participate in FaceTime visitation or any form of

therapy to help develop a healthy attachment to his children. Of significance to this matter, Tracy prevailed on custody, including the parties' dispute concerning joint legal custody, and upholding the Domestic Abuse Protection Order against Michael. (T47-49, T53) Lastly, the equities of the situation would require an award of attorney fees. Tracy has been receiving unemployment compensation of approximately \$1,733.33 per month since January 2019 which appears will continue due to injuries sustained in a car accident, while Michael is gainfully employed earning well over \$4,000.00 per month. (12:18-21; 14:6-22; 55:16-20; 437:8-14; T62; E14,1:290)

Tracy utilized the legal services of William Chapin prior to hiring Gregory Barton in September 2018. (126:22-24) Mr. Barton has been in the practice of law for over 30 years and charges a modest \$250.00 per hour. (E35,1-4:127) Mr. Barton charged Tracy \$5,525.00. *Id.* Tracy chose not to seek recovery of attorney fees she incurred from William Chapin. (126:25-127:6)

The District Court abused its discretion by denying Tracy a modest request for attorney fees.

## **CONCLUSION**

The District Court abused its discretion in not ordering Michael to therapeutic parenting time. The overwhelming evidence presented clearly establishes a pattern of domestic abuse and violence that has traumatized the children. That trauma has been increased due to choices Michael has made to distance himself from them. Finally, throughout the duration of this case, Michael has failed to avail himself of opportunities to develop a healthy relationship to the children. In addition to reversing the District Court's parenting time determination, vague provisions concerning pickup/dropoff times should be made specific and a provision ensuring the safety of Tracy against Michael during exchanges of the children should be made.

The District Court abused its discretion by allowing Dr. McNeese to testify and entering his affidavit into evidence. The act deprived Tracy of an ability to adequately prepare for trial and ended in an unjust result. The Court of Appeals should disregard the affidavit and testimony and enter a parenting time schedule that is based on the evidence.

The District Court abused its discretion in finding Tracy in contempt. The record is bursting with evidence to suggest that Tracy believed that the criminal no-contact order trumped the District Court's order. When eventually modified to allow contact between the parties, Tracy facilitated parenting time as ordered. The Court of Appeals should reverse the contempt and purge order accordingly.

The District Court abused its discretion in finding Tracy had an earning capacity of \$58,000 per year despite no evidence to suggest she could realize that amount of earnings. Additionally, the child support calculation worksheet adopted by the District Court contains figures inconsistent with the District Court's findings and evidence

presented. The Court of Appeals should reverse the child support calculation and adopt its own based on the evidence presented.

The District Court abused its discretion in finding Tracy dissipated \$5,800.00 of Michael's inheritance when the overwhelming documentary evidence established that the funds were used to benefit the family rather than selfish purchases made on the verge of a breakdown of the marriage. The Court of Appeals should reverse the District Court's marital property division, find no dissipation of assets, and equally divide the remaining marital debt.

The District Court abused its discretion in failing to award Tracy attorney fees. The case was of a long duration, included domestic abuse/violence, a criminal case, protection order review, contempt orders, and the inclusion of therapists. Tracy prevailed on custody, including the parties' dispute concerning joint legal custody, and upholding the Domestic Abuse Protection Order against Michael. Financially this case burdened Tracy greater than Michael. Tracy's income is less than half that of Michael's. The general equities of the situation would call for an award of attorney fees and the Court of Appeals should reverse the District Court and award \$5,525.00 in fees to Tracy.

Respectfully submitted,

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# Certificate of Service

I hereby certify that on Wednesday, March 11, 2020 I provided a true and correct copy of this *Brief of Appellant Gandara* to the following:

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